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Supreme Court, U.S.
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SUPREME COURT OF THE UNITED STATES
October Term, 1987
No.

Douglas A. Page,

Petitioner,

vs.

Commissioner of
Internal Revenue,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

Douglas A. Page
Petitioner Pro se
1140 Lilac Drive
Golden Valley, MN 55422
(612) 937-9351
Dated: November 5, 1987.

Questions Presented

1. Whether the Internal Revenue Service may, consistently with the First Amendment to the United States Constitution, administer tax regulations concerning the income of churches in such a manner as to give preference to certain religious denominations over others.

2. Whether the Internal Revenue Service may, consistently with the First Amendment to the United States Constitution, adopt more stringent rules for determining whether income is earned as a principal or agent for religious organizations than it does for secular organizations.

3. Whether the court erred in imposing sanctions of attorneys' fees and double costs upon Petitioner, for bringing a good faith appeal raising genuine constitutional questions.

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Opinions Below

The opinion of the United States Court of Appeals for the Eighth Circuit in this matter is reported as Page v. C.I.R., 823 F. 2d 1263 (8th Cir. July 14, 1987), rehearing denied, August 13, 1987.

The Eighth Circuit, in its decision, affirmed the judgment of the Tax Court reported as Page v. C.I.R., 51 T.C.M. 1351 (1986).

Jurisdiction

On March 13, May 1, and October 22, 1984, the Internal Revenue Service mailed to Petitioners Notices of Deficiency for income tax for calendar years 1979, 1980, 1981, and 1982. Petitioner filed timely petitions with the United States States Tax Court seeking redetermination of the deficiencies.

On July 3, 1986, the Tax Court upheld Petitioner's position with respect to calendar year 1979, but affirmed Respondent's position with respect to the remaining tax years. Petitioner filed a timely appeal to the United States Court of Appeals for the Eighth Circuit, which dismissed

Petitioner's appeal in part and affirmed in part on July 14, 1987. The Court of Appeals denied Petitioner's Petition for rehearing on August 13, 1987. Jurisdiction of the Court is conferred by Title 28 U.S.C. §1254 (1).

Constitutional and Statutory Provisions Involved

The United States Constitution, Amendment I, provides:

> "Congress shall make no law respecting establishment of religion, or prohibiting the free exercise thereof; or abridging freedom of speech, or of the press; or the right of the people peaceably to assemble and to petition the Government for a redress of grievances."

Rule 38 of the Federal Rules of Appellate Procedure provides:

> "If a Court of Appeals shall determine that an appeal is frivolous, it may award just damages and single or double costs to the Appellee."

Statement of the Case

On May 1, 1984, a notice of deficiency determining deficiencies in income tax and addition to tax for taxable years 1979 and 1981 was mailed to Petitioner Douglas A. Page at 15817 Valley View Road, Eden Prairie, Minnesota 55344. (Stipulation, paragarph 1, exhibit 1-A).

On March 13, 1984, duplicate original notices of deficiency determining deficiencies in income tax for the taxable year 1980 were mailed to Petitioners Douglas A. Page and Carolyn Page. (Stipulation, paragraph 2, exhibit 2-B). On October 22, 1984, a notice of deficiency for taxable year 1982 was mailed to Petitioner Douglas Page. (Stipulation, paragraph 3, exhibit 3-C).

Petitioners filed timely petitions with the Tax Court seeking redetermination of all of the above deficiencies assessments. Petition No. 18580-84 challenged the deficiency notices for calendar years 1979 through 1981, and is set forth as document No. 3 in the record certified from the Tax Court. Petition No. 822-85 challenged the deficiency notice for calendar year 1982, and is set forth in the certified record as document No. 7.

The two petitions are virtually identical and raise identical issues for all of the tax years in question.[1]

The Petition in No. 18580-84, for example, alleges the following:

> "4. The determination of tax set forth in said notices of deficiency are based upon the following errors by Respondent:

A. The W-2, consulting, interest, commission and self-employment income alleged by the Commissioner are not the income of the taxpayer, in that all income attributed to the taxpayer are actually receipts of the Basic Bible Church of America, Eden Prairie, Minnesota, and the American Fundamentalist Church." Document No. 3, p. 2

The facts upon which Petitioners relied for the foregoing assertions were set forth in the petition as follows:

"All members of the Basic Bible Church, Eden Prairie, were required in 1979 as a condition of membership to engage themselves in the work of the church in a productive manner and setting. Any monetary result was incidental and was the property of the church. All W-2, consulting, interest, commission and refund income was the property of the church at all times, and was never the property of the taxpayers. During 1980 and 1981 the American Fundamentalist Church contracted with 30 persons, directed its members to perform the work required of the church by said contract, oversaw and supervised the work, and alternately received any payments under the contract.

The petition also asserted that Respondent Internal Revenue Service was selectively enforcing its regulations concerning secular income derived by ministers, and imposing a denominational preference in favor of established religions, to the detriment of newer and smaller denominations. See Id. at 4-5.

On July 3, 1985, Petitioners' attorney, Robert M. Spector,[2] moved to withdraw as counsel for Petitioners, which motion was granted on July 8, 1985, some two months prior to the scheduled trial. See document nos. 19-20 of the certified record.

On August 9, 1985, Petitioners, acting pro se, moved for a continuance of the trial date, in light of the withdrawal of their attorney, which order the Tax Court scheduled for

hearing on September 9, 1985, the very date the matter was scheduled to proceed to trial. See document nos. 28-29. Notice of appearance by Petitioners' appellate counsel, who also represented Petitioners at trial, were filed on September 9, 1985, the date originally noticed for trial. See document nos. 30-31.

On September 9, 1985, when Petitioners' pro se motion for continuance was considered, Petitioner Douglas Page submitted an affidavit, a copy of which is set forth in the Appendix at A. 48 - A.52 stating that subsequent to Mr. Spector's withdrawal on July 8, 1985, he had either contacted or attempted to contact some 12 other attorneys in order to obtain representation for the trial scheduled

to commence on September 9, 1985, and was not able to retain counsel until the end of August, 1985, some two weeks prior to the scheduled trial. On September 9, 1985, determinaton of motion for continuance was again postponed until September 19, 1985, the day the date set for trial on the merits. See Document No. 32.

At that time, Petitioner, now represented by counsel, submitted a renewed motion to continue, on the specific ground that there had not been adequate time for Petitioners' new counsel to conduct discovery and to prepare factually on the issue of unequal enforcement by the Internal Revenue Service of its rule concerning assignment of income by religious leaders. See Document No. 37.

The motion was supported by an affidavit by Petitioners' counsel, which stated, in pertinent part, as follows:

> "6. During the course of representation of Petitioners, your affiant has become aware that substantial evidence exists that major religious denominations function in precisely the same manner as Petitioners are functioning in the instant case, namely performance by clergy of secular functions, in exchange for compensation given to the church. Examples which have come to your affiant's attention include, but are not limited to the following:
>
> a. A Roman Catholic priest doing a television commercial for Kero-Sun portable kerosene heaters, for which a Roman Catholic parochial school was paid the sum of $16,000.00. See Exhibit A attached hereto.
>
> b. An exotic dancer, who donated approximately 80 percent of her earnings from striptease performances to the Roman Catholic Church. See Exhibit B attached hereto.
>
> c. Roman Catholic nun who engages in secular employment as a handwriting expert to private industry, donating her profits to a religious order, pursuant to a vow of poverty. See Exhibit C attached hereto.

d. An order of Roman Catholic nuns who engage in a business of raising and selling miniature horses, the profits of which are all assigned to their religious order. See Exhibit D attached hereto.

e. A Roman Catholic priest who produces television programs, donating, pursuant to a vow of poverty, all of the proceeds thereof to the church. See Exhibit E attached hereto..,

Given the obviously widespread nature of officials of religious orders engaging in secular fund raising activities, assigning the proceeds of their secular labor to the church, it is clear that unless Respondent proceeds against these other religious groups, with the same vigor that it proceeds against Petitioners and other representatives of small, minority, or unpopular religious groups, serious constitutional issues would be raised.

7. From reviewing the files prepared by your affiant's predecessor, it is clear that absolutely no discovery was done with respect to the Internal Revenue Service's practices toward enforcing the 'no assignment of income rule' with respect to major religious denominations who engage in the practice. In the absence of such discovery, it is impossible for your affiant adequately to present the issue of denominational preference

or unequal treatment, raised in the pleadings." Appendix at A.53 - A. 66.

At a pre-trial hearing on September 9, 1985, the Tax Court Judge denied the motion for continuance for the purpose of conducting discovery, and, solely on the ground that evidence of denominational preference even if discovered, would be irrelevant to Petitioners' tax liability. See T. at 9-11.

Following the denial of the motion for continuance for the purpose of obtaining discovery of the Internal Revenue Service's enforcement practices with respect to other denominations, Petitioners' attorney advised the court that it was his intention to issue a subpoena to Mr. Switzer, the District Director of the Internal Revenue

Service, to examine him, on the record, at trial with respect to his enforcement practices regarding other religious organizations on the issue of assignment of income. T. 13. The Tax Court said such testimony would be excluded as irrelevant. See T. 14-17.

At trial, Petitioner Douglas Page had testified that his present occupation was "work for the American Fundamentalist Church" (T. 31). He indicated that co-Petitioner Carolyn Page was his former wife, from whom he was divorced in December of 1984 (T. 31).

Douglas Page testified that his first contact with the Basic Bible Church came in late 1974 and early 1975 (T. 57), and that he became involved through Wayne Chermack (T. 53). Douglas

Page testified that he became involved in the Basic Bible Church because he became attracted to the tenets of Jerome Daley, the church founder, including the idea that big government was driving apart the family unit, and the country was "headed to the dogs." (T. 53-54). Douglas Page testified that Jerome Daley liked the way Mr. Page could express himself, and indicated a desire to move Mr. Page into a higher position in the organization, specifically ordaining him as a minister, which took place in early 1978 (T. 57). Included in the material provided by Daley to the Pages were directive letters, directing them to obtain and pursue gainful employment for the benefit of the church, and vows of poverty, irrevocably donating the income earned from those occupations to the

Basic Bible Church, which had been chartered by Daley.[3]

The undisputed testimony was that upon receiving the church charter, bylaws, ordination, vow of poverty and directive letters, Petitioners did not merely continue their old style of living and refuse to pay taxes; rather, Petitioners immediately sought legal advice from Joseph Mannikko, an attorney in no way affiliated with Jerome Daley or the Basic Bible Church organization (T. 59). As a result, Mannikko issued to Petitioners two legal opinions as to the tax consequences of their ordination, establishment of their church, and undertaking the vow of poverty. Those two opinions were introduced into evidence as Exhibits 34 and 35.

Petitioner Douglas Page specifically testified that there was a religious basis for his obtaining secular employment and donating the proceeds to the church, that being "an aversion on our part to the Bible-thumping type of fund-raising used by the other churches, and the begging on the street corner, and what I would consider carnival-type atmosphere in fund-raising methods by other churches." T.69-70. Petitioner Douglas Page testified, "Our feeling was that in corresponding to the basic work ethic, that we should go out and work for the church." T. 70.

Petitioner Douglas Page testified that pursuant to Mannikko's advice, contracts were drafted for persons for whom Petitioner Douglas Page performed

secular services, indicating a contractual relationship between the church and Petitioner Douglas Page, and further indicating Petitioner Douglas Page was performing his work in the capacity as an agent for the Basic Bible Church, rather than as a principal (T. 74-75).

Petitioner Douglas Page testified that, in addition, pursuant to Mannikko's advice, the Basic Bible Church maintained a strict policy of separating church funds, collected and donated to the church for church purposes, from Petitioners' personal funds (T. 155). Petitioner Douglas Page testified that apart from church-related expenditures, the Basic Bible Church paid to Petitioners a stipend in compensation for Petitioners' services,

which stipend Petitioners reported on Form 1040 as their own personal income (T. 160). Out of this stipend, Petitioner paid for his children's private school education (T. 164), other school expenses (T. 164), personal magazine subscriptions (T. 165), personal clothing (T. 165),[4] and personal use of church vehicles (T. 223).

From the church account were paid mortgage and utility expenses on the church property (T. 157-162),[5] expenditures for a church airplane (T. 157),[6] and church advertising (T.160).

In addition the undisputed testimony at trial was that in fact Petitioners did operate a functioning church. In fact, the testimony plainly indicated that the church was operated for charitable and religious purposes

such as advertising in the church directories of the Sun Newspapers (T. 81, Exhibit 38), proselytizing through the distribution of religious literature (T. 82-87, Exhibits 39-42); conducting regular religious services (T. 120-122, Exhibit 47); publishing sermons and purchaisng religious tracts for distribution to the general public (T. 122-128, Exhibit 46); conducting marriages (T. 131, Exhibit 54); providing food for the needy (T. 135); and providing counseling services to those who needed them (T. 135).

On January 13, 1980, the Board of Trustees of Chapter 8035 of the Basic Bible Church decided to incorporate and to change its name to the American Fundamentalist Church (T. 168, 171, exhibit 50).

The transition for Basic Bible Church to American Fundamentalist Church took from January through October of 1980, and included filing original and amended articles of incorporation, obtaining new employer identification numbers, and transferring title to all real and personal property, including bank accounts to the new organization (T. 172-174, exhibits 17-AP and 17-AQ).

Upon conversion of the Basic Bible Church to the American Fundamentalist Church, Petitioners secured re-execution of all existing service contracts, and continued to provide that they would provide personal service for outside employers, only in the capacity as agents for the American Fundamentalist Church, and not as principals (T. 187).

After the conversion from the Basic Bible Church to the American Fundamentalist Church, the American Fundamentalist Church continued to operate for religious and charitable purposes (T. 188-194 and related exhibits).

As was done by Petitioners as ministers of the Basic Bible Church, as ministers of the American Fundamentalist Church, Petitioners maintained separate bank accounts for their personal expenses, and gave additional persons signatory authority over church accounts, further diluting any control Petitioners may have had over church funds (T. 174-186, exhibits AS, AW, 58, and 59).

On the basis of these facts, the Tax Court ruled that any income earned

by Petitioners was earned in their individual capacity, rather than any capacity as an agent for either the Basic Bible Church or the American Fundamentalist Church. See Page v. C.I.R., 51 T.C.M., 1351, 1357 (1986). However, the Tax Court specifically refused to award damages to Respondent under Title 26 U.S.C. §6673 upon the assertion that the Petition to Tax Court was frivolous or groundless. See Id. at 1358.

On appeal, the United States Court of Appeals for the Eighth Circuit dismissed Petitioners' appeal for tax years 1980-81 and affirmed with respect to tax year 1982. In addition, the court imposed double costs and attorney's fees against Petitioners pursuant to Rule 38 of the Federal

Rules of Appellate Procedure. See Page v. C.I.R., 823 F. 2d 1263, 1272-1273 (8th Cir. July 14, 1987).

On August 13, 1987, the Court denied Petitioners' Petition for Rehearing. A copy of said Petition, together with the order thereon are set forth in the Appendix at A.67 - A. 83.

Argument

I. The Court of Appeals erred when it held that it was legally irrevelant when it held that the Internal Revenue Service administers its income tax regulations by exhibiting a denominational preference for older, established religions, a decision plainly in conflict with the applicable decisions of this Court.

As already noted, supra, Petitioners in their petitions to the Tax Court argued that the Internal Revenue Service, in adminstering its own regulations concerning whether income earned by clergymen performing

secular services is taxable to the individual clergymen themselves or to the church, applies a denominational preference, in that it ignores such assignments of income when done by clergymen of major religious denominations, but prohibits such assignment when done by members of newer, less popular religious denominations. At trial, the Tax Court both refused to allow Petitioners to examine the IRS District Director on the record concerning the Internal Revenue Services practices and whether a denominational preference existed, and refused to grant Petitioners a continuance for the purpose of conducting discovery on that issue. The basis for both rulings was a holding, apparently, that whether or

not the Internal Revenue Service engaged in denominational preference in the administration of its regulations was irrevelant to Petitioner's petition. The holding was clearly erroneous.

This Court has long held that a cornerstone of both the Estabishment Clause and Free Exercise Clauses of the First Amendment to the United States Constitution is that government conduct itself in a manner as to not create any denominational preferences among religious groups. The principle was most clear set forth by the decision of this Court in Larson v. Valente, 456 U.S. 228 (1982), in which the Court invalidated the Minnesota Charitable Registration Statute, to the extent that it imposed a denominational preference in favor of major religious

organizations. In so doing, the Court stated as follows:

> "The clearest command Establishment Clause is that one religious denomination cannot be officially preferred over another. Before the Revolution, religious establishments of differing denominations were common throughout the colonies (footnote omitted),but the Revolutionary generation emphatically disclaimed that European legacy, and 'applied the logic of secular liberty to the condition of religion and the churches:' (footnote omitted) If Parliament had lacked authority to tax unrepresented colonists, then by the same token the newly independent States should be powerless to tax their citizens for the support of a denomination to which they did not belong (footnote omitted). The force of this reasoning led to the abolishment of most establishments at the state level by the 1780's (footnote omitted), and led ultimately to the inclusion of the Establishment Clause in the First Amendment in 1791 (footnote omitted).
>
> This constitutional prohibition of denominational preferences is inextricably connected with the continuing vitality of the Free Exercise Clause. Madison once noted: 'Security for Civil Rights

> must be the same as that for religious rights. It consists in the one case in the multiplicty of interests and in the other in the multiplicity of sects.' (Footnote omitted). Madison's vision--freedom for all religion being guaranteed by the free competition between religions--naturally assumed that every denomination would be equally at liberty to exercise and propagate its beliefs. But such equality would be impossible in an atmosphere of official denominational preference. Free exercise thus can be guaranteed only when legislators -- and voters-- are acquired to accord their own religions the very same treatment given to small, new, or unpopular denominations." Id. at 244-245.

In Larson, the challenged statute on its face created a denominational preference by imposing a reporting requirement only on those denominations which secured more than 50 percent of their contributions from persons other than members of said denominations. However, the courts have made it

absolutely clear that the prohibition against denominational preference is not limited to statutes which facially create such a preference, but may also include statutes or regulations, facially neutral, administered in such a manner as to create a denominational preference in fact. For example in Elbe v. Yankton Independent School District No. 1, 714 F. 2d 848 (8th Cir. 1983), and Michaelson, ex rel. Lewis v. Booth, 437 F. Supp. 439 (D.R.I. 1977).

Both the United States Tax Court and at least one federal appellate court have also plainly recognized that denominational preference, if established, might serve as a bar to Internal Revenue Service actions to collect taxes. See Church of Scientology v. C.I.R.. 83 T.C. 381

(1984) and Karme v. C.I.R., 673 F. 2d 1062 (9th Cir. 1982).

The Court of Appeal's reasons for upholding the Tax Court findings of irrelevancy are unpersuasive at best.

To begin with, the Court of Appeals placed Petitioners' argument in a factually erroneous context. The Court of Appeals, in its opinion, stated that the object of the case "was to determine whether Appellants had met the requirements of 26 U.S.C. §§170 and 501(c)(3). 823 F. 2d at 1269-1970 (footnotes omitted).

In fact, Petitioners did not raise the question of denominational preference in that context. Rather, Petitioners raised the issue in the context of consideration of the issue of whether or not the Internal Revenue

Service rules prohibiting the assignment of income earned by ministers to their churches, was being applied in an evenhanded manner. Petitioners asserted the argument that they should be able to conduct discovery and present evidence as to whether or not the Internal Revenue Service rules prohibiting the assignment of income were being enforced only against small, minor denominations, labeled "tax protesters" by the Internal Revenue Service, and not applied to major religious denominations which engage in the identical practice.

In this context, the relevance of the tendered evidence was obvious. The Court of Appeals cited no authority in support of the proposition that the

Internal Revenue Service is free to apply its rules only to certain denominations and not to others. The only case cited by the Court of Appeals in its opinion is Mone v. Commissioner, 774 F. 2d 570, 573 (2d Cir. 1985), in which the court stated:

> "The taxpayers assert that by disregarding their vows of poverty the Commissioner violated their constitutional right to freely exercise the religion of their choice. Petitioners contend that the I.R.S. failed to give the Life Science Church the same recognition accorded 'mainstream' religions. It is patently obvious, however, that the cases before us do not present a question of constitutional magnitude. Rather, the Tax Court confronted the simple issue of whether the taxpayers established the existence of an agency relationship. Members of 'main-stream' religions carry the same duty. The taxpayers' allegations of discrimination are therefore spurious."

However, Petitioners, in the instant case, did not assert, as did

the taxpayer in Mone that the mere applicability of the prohibition against assignment of income to a church deprived Petitioners of freedom of religion. Rather, they sought discovery to determine whether or not, as far as the practices of the Internal Revenue Service were concerned, "mainstream" religions did in fact carry the "same duty" as Petitioners carry. By way of offer proof, Petitioners presented substantial evidence that "mainstream" religions engaged in practices virtually identical to those engaged in by Petitioner, and sought discovery as to whether or not the Internal Revenue Service, in practice, imposed the "same duty" upon such mainstream denominations. It was this

determination that the Tax Court deemed "irrelevant."

Thus, in contrast with Mone, in which the court found that the taxpayer did not make a showing of discriminatory enforcement, Petitioners in the instant case sought to engage in the discovery that would enable them to make precisely that factual showing. To say that such a factual showing, if made, is irrevelant is, in effect, to say that the Internal Revenue Service, as a matter of law, is free to apply one set of rules to one denomination, and another set of rules to another. The Court cites no authority for such a proposition, and plainly none exists. The authority in question plainly would prohibit the Internal Revenue Service from applying its rules with a

denominational preference. See Church of Scientology v. C.I.R., supra, 83 T.C. 381 (1984) and Karme v. C.I.R., supra, 673 F. 2d 1062 (9th Cir. 1982).

II.

The Court of Appeals erred, in a manner contrary to the decisions of this Court, when it decided that the Internal Revenue Service Court, consistently with the First Amendment to the United States Constitution, apply stricter prohibitions against assignment of income to religious organizations than it does to secular organizations.

To be sure, U.S.C. §61(a) provides that, unless specifically excluded by law, gross income means all income from whatever source derived, including, but not limited to compensation for services rendered. And, to be sure, this Court in Lucas v. Earl, 281 U.S. 111 (1930), held that income is to be taxed to the person who earns it, and

that taxation cannot be escaped by any anticipatory assignment of income.

However, despite the prohibition against anticipatory assignment of income, the Internal Revenue Service itself has recognized that when a taxpayer earns income in the capacity as agent, rather than as a principal, the income is not properly taxed to the agent, but rather to the principal.

As stated in Rev. Rul. 76-479, 1976-2 C.B. 20:

> "[T]he Internal Revenue Service has recognized that amounts received by an agent on behalf of a principal, and turned over to the principal, are not taxable to the agent under §61(a) of the Code.

The ruling involved a situation in which the medical staff of a non-profit hospital formed a non-profit research and educational foundation to

discuss and to conduct experiments concerning the cause, nature, prevention and cure of certain diseases. All members of the hospital's medical staff were required by the hospital to be members of the foundation. In order to further the goals of the foundation, the foundation agreed to provide medical services to patients with limited incomes, charging some fees to the county for indigent patients, and rendering other medical services based upn a patient's ability to pay. Each member of the medical staff executed an assignment form enabling the foundation to collect all fees generated as a result of the foregoing procedure. The Internal Revenue Service held that because all doctors in the hospital were required to be members of the

foundation and that membership in the foundation itself required that all fees be turned over to the foundation, that the doctors collected said fees, not as principals, but rather as agents of the foundation. Thus, all income so generated was income, not of the individual doctors who actually performed the services, but rather of the non-profit foundation which was in fact the recipient of said services.

The Revenue ruling was consistent with a long line of prior rulings by the Internal Revenue Service on the tax status of income earned by persons working as agents rather than as principals.

For example, in Rev. Rul. 58-220, 1958-1 C.B. 26, it was held that fees earned by physicians performing medical

services were not taxable income to the physicians in situations in which the physicians were appointed on a full-time salaried basis to the staff of a hospital, and in which the physicians received no fees from the individual patients, but rather all fees were paid to the hospital. This was held to be true even in cases in which the patients insisted upon making checks for services rendered payable directly to the physicians, and the physicians, pursuant to a hospital rule, endorsed the checks directly over to the hospital.

See also Rev. Rul. 69-274, 1969-1 C.B. 36, in which a university made available to a local hospital faculty physicians of its medical school and these physicians provided medical care

to indigent patients at the hospital, for which compensation was rendered under the Medicare program, and the service held fee assignments to the University to be appropriate.

The holding that income actually earned as an agent, rather than as a principal, is not to be taxed has by no means been confined to physicians. In Rev. Rul. 65-282, 1965-2 C.B. 21, it was held that attorneys need not include in their gross income legal fees paid them, in a situation in which they had been appointed by a court to represent indigent criminal defendants, when, under the terms of their employment agreement, they were required to turn all such legal fees over to their employer, a legal aid society.

A similar result was reached in Rev. Rul. 74-50, 1974-1 C.B. 22, in a case involving the employment by a railroad company of young persons, pursuant to a government-sponsored summer work program, in which the difference between program scale wages and union scale wages were assigned to a state agency.

Rev. Rul. 58-515, 1958-2 C.B. 28 involved the situation of a police officer, who pursuant to the performance of his duties as a police officer, was required to obtain employment in private industry, for the purpose of obtaining certain information as an undercover agent, without disclosure of his identity. The police officer was paid, just as any other employee in private industry

was paid, but also continued to receive his regular police salary. Under the rules of the police department, any compensation he received from private industry while working as an undercover agent was required to be turned over to the police pension fund. Despite the fact that the officer received the income as an employee of private industry, and had Federal and State taxes deducted pursuant to Form W-2 from the private industry, it was held that the income was not taxable to the officer.

These same principles have also been applied to situations in which members or employees of religious orders, such as Petitioners, acting pursuant to directions and requirements from their religious superiors, earned income in outside employment which was

subsequently turned over to the religious order. In Rev. Rul. 57-135, 1957-1 C.B. 307, a church committee directed a volunteer service program, under which church members performed services in connection with community projects, mental hospitals, reform schools, institutions for the handicapped, and similar establishments throughout the United States. Some of the establishments served paid to the church committee contributions in the amounts equal to the prevailing pay scale of individuals who received compensation similar to that performed by the volunteers. It was held that under these circumstances, members of the church committee acted as agents of the church committee, and not as principals, so that the amounts paid to

the hospital in return for their services did not constitute gross income for income tax purposes.

Lucas v. Earl, supra, notwithstanding, the Internal Revenue Service has long recognized that members of religious orders or ordained clergy who take vows of poverty and turn income they earn as a result of the church's direction back to the church pursuant to the vow of poverty are not liable for income tax on the amounts received. The Internal Revenue Service declared in O.D. 119, 1 C.B. 82:

> "A clergyman is not liable for any income tax on the amount received by him during the year from the parish of which he is in charge, provided that he turns over to the religious order of which he is a member, all money received in excess of his actual living expenses, on account of the vow of poverty which he has taken.

> Members of religious orders are subject to tax upon taxable income, if any, received by them individually, but are not subject to tax on income received by them merely as agents of the orders of which they are members."

To be sure, O.D. 119 has been superseded by Rev. Rul. 77-290, 1977-2 C.B. 26. However, despite the fact that O.D. 119 has been superseded, Rev. Rul. 77-290 continues to recognize the validity of the principles enunciated therein. The Revenue Ruling states, in pertinent part:

> "The conclusion of O.D. 119 is supported by two principles, the first of which is that of a member of a religious order under vow of poverty is not immune from Federal income tax by reason of such vow, but is subject to Federal income tax to the same extent as any other person on income earned or received individually. Thus, income earned or received by a taxpayer as a principal, and not as an agent, is taxable to the taxpayer...The second principle stated in O.D. 119 is that where an agent receives

income on behalf of a principal, the income is not taxable to the agent but to the principal.

Thus, in cases where a member of a religious order receives income as an agent of the order, and, pursuant to a vow of poverty, remits the income to the order, such income is the income of the order and not the member."

In denying agency status to Petitioners, both the Tax Court and the Court of Appeals relied upon the two-part test adopted by the Second Circuit in Mone v. C.I.R., 774 F. 2d 570 (2d Cir. 1985), in which the court stated:

"To prove assignment of income on agency theory, the taxpayers bear a double burden: They must show that a contractual relationship existed between their secular employers and a religious order, and that the religious order controlled or restricted taxpayers' use of the money purportedly turned over to the order." Id. at 573.[7]

Apparently the source of such standard is Rev. Rul. 77-290, supra,

1977 C.B., 26, in which the Internal Revenue Service ruled that an attorney who is a member of a religious order and had taken a vow of poverty, and who had also been instructed by this order's superiors to obtain employment in a law firm with the State, was an agent of the employing law firm, and not the religious order, and must therefore include the renumeration remitted to the order in his gross income. The Revenue Ruling also held that a secretary who was a member of the same order and also under a vow of poverty, who was instructed by the order's superiors to perform services in the business office of the church that supervised the order was an agent of the order and not required to

include her earnings in her gross income.

In so ruling, the Internal Revenue Service relied upon its prior ruling in Rev. Rul. 76-323, 1976-2 C.B. 18, in which the Internal Revenue Service stated the following:

> "In order for the employment of a member of a religious order to constitute an exercise of duties required by such order within the meaning of the Employment Tax Regulations, the services must be of the type that are ordinarily the duties of members of the Order, consideration will be given to the established activities of the orgainzation. Ordinarily, a member is performing services as the agent of a religious order only if the order is engaged in their performance of the services of a principal. Ordinarily an order is not engaged in the performance of services as a principal where the legal relationship of an employer and employee exists between the member and the third party with respect to the performance of the services."

With regard to these rather rigid rules for determining agency in the case of ministers and members of religious orders, it should be noted that other than ministers and members of religious orders, no other persons whom the Internal Revenue Service have held to be acting as agents rather than principals have been measured against such strict standards. In fact, if they were, agency would not have been found. For example, if the agency requirements the Revenue Rulings held to be required for ministers and members of religious orders were applied to the undercover police officer who was the subject of Rev. Rul. 58-515, supra, 1958-2 C.B. 28, it is clear agency would not have been found, since the police department was

generally not in the business as a principal of providing employees to private industry, since an employer-employee relationship existed between the police officer and the private industry, since there ws apparently no contractual relationship between the police department and private industry to employ the officer, and since presumably other members of the same private business performed the same duties that the officer did. Similarly, the attorneys involved in Rev. Rul. 68-282, supra, 1965-2 C.B. 121, and the physicians involved in the other Revenue Rulings cited, supra, would similarly have to have been denied agency status, since other physicians and attorneys performed similar duties. Similarly disqualified

would be the summer youth employees in Rev. Rul. 74-50, supra, 1974-1 C.B. 22, since the facts make it clear that those employees provided precisely the same work as regular railroad company employees, only at a lower rate of pay, and because an employee-employer relationship existed between the railroad company and the summer youth employees.

It is therefore clear that the only persons to whom such restrictive views of agency are currently applied or to whom they have ever been applied are ministers and members of religious orders. It is clear that to require agents of religious organizations to meet stricter definitions of agency than those applied to secular institutions is to grant preference to

the non-religious over the religious, which is in direct violation of both the Establishment and Free Exercise Clauses of the First Amendment to the United States Constitution. This was made clear by the decision of this Court in Widmar v. Vincent, 454 U.S. 263, (1981), when the United States Supreme Court held a First Amendment violation to exist when a state university refused to make available its pubic facilities to religious organizations on the same basis that it made them available to secular or non-religious organizations. See also Everson v. Board of Education, 330 U.S. (1947). Clearly the First Amendment to the United States Constitution demands that the question of whether or not Petitioner acted as

an agent of the Basic Bible or American Fundamentalist Churches, rather than as a principal, be decided by the same agency standards applied to agents of secular organizations, the contrary Revenue Rulings notwithstanding. Judged by those standards, it is clear that Petitioners, acting under the clear direction and control of ecclesiastical superiors and taking vows of poverty, clearly received the funds as agents of the church, and not as principals.

The Court of Appeals rejected this argument, relying upon the 3-part test established by this Court in Lemon v. Kurtzman, 403 U.S. 602 (1971), stating that in order to avoid Establishment Clause violations, a policy must (1) must have a secular legislative purpose

(2) must have a principal or primary effect that neither advances nor inhibits religion, and (3) must not foster an excessive government entanglement with religion. See 823 F. 2d at 1271.

While setting forth the test, the Court of Appeals did nothing to establish that applying a different agency standard to religious and secular organizations complies with the test. It set forth no secular purpose for such a distinction, and plainly such a distinction will have the effect of inhibiting religion, since it makes religious activity more subject to tax liability that secular activity.

III.

The Court of Appeals departed from established law when it imposed costs and attorneys' fees upon Petitioners.

It should be noted that imposing attorney's fees and sanctions for a frivolous appeal, the Court of Appeals did what the Tax Court expressly refused to do. In the Tax Court, Respondent sought damages for bringing a frivolous appeal to Tax Court. The Tax Court judge rejected the argument stating as follows:

> "Respondent, by motion, is seeking damages under §§6673 for instituting or maintaining this case for delay or because Petitioners' position in this proceeding is frivolous or groundless. Based upon the entire record in these consolidated cases, we declined to award damages under §6673." Page v. C.I.R., 51 T.C.M. 1331, 1358 (1986).

Respondent took no appeal from this holding.

The Court of Appeals advanced no reasons while arguments plainly found not frivolous by the Tax Court somehow

became frivolous when pressed upon appeal. Obviously, the issues of denominational preference, Establishment Clause violations, and other issues raised in the Court of Appeals were serious, substantial, and taken in good faith. Courts have held that the imposition of sanctions is to be exercised with great caution so as not to "stifle the enthusiasm or chill the creativity that is the very life blood of the law." See Eastway Construction Corp. v. City of New York, 762 F. 2d 243, 254 (2d Cir. 1985).

In the instant case, it is absolutely clear, given the substantial and non-frivolous nature of the arguments advanced by Petitioners' attorney, that the sole purpose and the imposition of sanctions was to chill

and stifle forceful advocacy by those who oppose the policies of the Internal Revenue Service and big government in general.[8]

Unfortunately, the imposition of sanctions had precisely that effect, since the sanctions plainly had the effect of intimidating Petitioners' attorney out of signing his name to the Petition for Rehearing.[9]

Further, as a result, the present petition is being submitted pro se.

Conclusion

For all of the foregoing reasons, the Petition for Writ of Certiorari to the United States Court of Appeals should be granted.

Respectfully submitted,

Rev. Douglas Page

Reverend Douglas Page,
Pro Se
1140 North Lilac
Golden Valley, MN 55422
(612) 937-9351

Dated: Nov 5, 1987, 1987.

FOOTNOTES

[1]Petition No. 18580-84 challenged the assessment of a failure to file a penalty for taxable year 1979, and further argued that because a tax return for 1979 ws timely filed, the notice of deficiency that year was barred by the Statute of Limitations. The Tax Court ruled in Petitioners' favor on this issue. See 51 T.C.M. 1351, 1355-6. In addition, Petition No. 822-85 challenged the imposition of a failure to file penalty for calendar year 1982. This issue was resolved when Respondent, on the eve of trial, abandoned the contention in its deficiency notice and conceded that Petitioner Doulgas Page did in fact file a timely 1982 income tax return. (T.27).

[2]Joseph L. Mannikko, the attorney who filed the original petitions with the Tax Court on behalf of both Petitioners, had previously withdrawn, by motion submitted to the Tax Court on January 28, 1985, and granted March 4, 1985. See document No. 11 of the certified record.

[3]See Exhibits 14-AM, 15-AN, and 16-AO.

[4]In its opinion, the Tax Court asserted that Petitioners used church funds for the purchase of their personal clothing. See 51 T.C.M. at 1357. The assertion is utterly without support in the record, since both Petitioner Douglas Page's testimony under oath and the documentary evidence submitted in conjunction therewith plainly indicate that clothing was paid for out of the personal stipend, rather than church funds.

[5]Petitioner Douglas Page testified that they transferred title to their former residence to themselves as trustees for the Basic Bible Church (T. 144), and proceeded to use the residence both as a church, for conducting church services, and as a parsonage.

[6]The undisputed testimony was that the airplane was used for church purposes, for travel to and from Wisconsin, where there existed substantial support for the Basic Bible Church, and rental to other church groups for the purpose of raising funds, the proceeds of which were placed in church coffers. (T. 157-158).

[7]Similar variants of such a test for agency relationships have recently been adopted in Schuster v. C.I.R., 800 F. 2d 672 (7th Cir. 1986).

[8]That the Court of Appeals imposition of sanctions was motivated by a desire to suppress Petitioners' religious and political beliefs is evidenced by the Court's gratuitous insertion into the opinion of Petitioners' church's beliefs and philosphy, which should have been irrelevant to the Court's opinion. See 823 F. 2d at 1266-1267.

[9]See letter attached to the Appendix at A.81 - A.82.

APPENDIX INDEX

Order and Opinion of the Eighth Circuit Court of Appeals, dated July 14, 1987. . A.1- A.47

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Order denying Rehearing Petition A.83

Douglas A. PAGE and Carolyn Page, Appellants
COMMISSIONER OF INTERNAL REVENUE, Appellee
No. 86-2327

United States Court of Appeals, Eighth Circuit.

Submitted May 15, 1987.
Decided July 14, 1987.
Rehearing Denied August 13, 1987

Internal Revenue Service issued notice of tax deficiencies to taxpayer and taxpayers contested deficiency. The United States Court determined deficiency existed and taxpayers appealed. The Court of Appeals, Timbers, Circuit Judge, sitting by designation held that: (1) taxpayers received income as agents of church and thus were not entitled to charitable deductions for amounts transferred to churches: (2) taxpayers failed to establish Internal Revenue Commissioner's imposition of additions to tax were improper; and (3) taxpayer's

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appeal was frivolous so as to warrant sanctions.

Dismissed in part and affirmed in part.

Randall D.B. Tigue, Minneapolis, Minn., for Appellants.

Michael L. Paup and Roger M. Olsen, Washington, D.C. for appellee.

Appeal from the United States Tax Court.

Before LAY, Chief Judge, MAGILL and TIMBERS, Circuit Judges.

TIMBERS, Circuit Judge.

Douglas A. Page and Carolyn Page ("appellants") appeal from the decision (No. 18580-84) entered August 5, 1986, in the United States Tax Court, Joel Gerber, Judge, 51 T.C.M. (CCH) 1351, which determined a deficiency in appellants' federal income tax for the year 1980 and in Douglas' federal income tax for the tax year 1981. The Court

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these deficiencies under Int. Rev. Code of 1954, §6653(a).[1] Douglas appeals also from a decision (No. 822-85) entered July 10, 1986 in the Tax Court, Joel Gerber, Judge, which determined a deficiency in his federal income tax for the tax year 1982. The Court imposed additions to tax with respect to this deficiency under §§6651(a), 6653(a) and 6654. Appellants on October 14, 1986 filed a single notice of appeal from the Tax Court decisions.

Appellants organized and operated Chapter 8035 of the Basic Bible Church of America Fundamentlist Church. Shortly after organizing this "church," appellants took a vow of poverty and transferred their home to themselves as trustees for the church. Assuming themselves exempt from federal income

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because of their relationship with the religious organization, appellants did not pay any tax on the income they received from secular employment. Consequently, the Commissioner of Internal Revenue ("Comissioner") issued notices of tax deficiency to appellants. Appellants contested the deficiency by filing petitions with the Tax Court.

After trial, the Tax Court held that appellants were not entitled to any charitable deductions for sums they purportedly transferred to the Basic Bible Church and to the American Fundamentalist Church ("the churches"). The Court further held that appellants received income during each of the tax years as principals, not as agents of the churches, and that these sums were subject to the federal income tax. The

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Court accordingly sustained the Commissioner's determination of a deficiency in appellants' income tax for the 1980 and 1981 taxable years and his assessments against appellants (No. 18580-84) of additions to tax under §6653(a) for negligence and intentional disregard of the rules and regulations of the IRS, and held that appellants failed to prove that these assessments were improper.

The Tax Court also sustained the Commissioner's determination of a deficiency in Douglas' income tax for the taxable year 1982 (No. 822-85) and the additions to tax under §6654 for failure to pay the estimated tax for that year, and held that Douglas had failed to prove that this assessment was improper. (As stated below, we do not

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have appellate jurisdiction with respect to the appeal in No. 822-85, which accordingly is dismissed).

On appeal, appellants argue, first, that the Tax Court erred in refusing to grant appellants a continuance for the purpose of conducting discovery on the issue of denominational preference in the administration of IRS policies and regulations with respect to the assignment of income earned by clergymen; second, that the Tax Court erred in determining that appellants received income as principals and not as agents of the churches; third, that the Tax Court erred in finding that appellants were not entitled to a charitable deduction for income transferred to the churches; and, fourth, that the Tax Court erred in

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sustaining the Commissioner's determination of deficiencies in appellants' income tax for the 1980 and 1981 tax years and his imposition of additions to tax for negligence and intentional disregard of the rules and regulations of the IRS.

The Commissioner argues that this Court does not have jurisdiction to consider the appeal from the Tax Court's July 10, 1986 decision regarding Douglas' 1982 tax deficiency. The Commissioner argues, however, that the Tax Court correctly held that appellants were liable for deficiencies in their income tax for the 1980 and 1981 tax years and for the additions to tax imposed by the Commissioner. In addition, the Comissioner requests that this Court impose sanctions upon

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appellants for bringing this frivolous appeal.

We hold, first, that this Court does not have appellate jurisdiction to consider the appeal from the decision regarding Douglas' 1982 tax deficiency; second, that the Tax Court correctly denied appellants' motion for a continuance; third, that appellants received the income as agents of the churches and that appellants are not entitled to any charitable deductions for any amounts transferred to either of the churches; fourth, that the Tax Court correctly sustained the Commissioner's determination of deficiencies in appellants' income tax for the 1980 and 1981 tax years and that the imposition of additions to tax under §6653(a) was proper, and fifth, that, inasmuch as

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this is a wholly frivolous appeal, our imposition of sanctions against appellants in this Court is appropriate.

I.

We summarize only those facts believed necessary to an understanding of the issues raised on appeal.

In 1978, appellants, husband and wife,[2] joined the Basic Bible Church of America. The philosophy of that church is that big government is driving apart the family unit and that the country is "headed to the dogs". Specifically, the by-laws of the church expound its philosophy as follows: "The basic Doctrines, Principles and Beliefs held as 'Truth' of the Basic Bible Church are the Declaration of Independence and the Constitution of the United States, and the sacred Bible. (16th[3] and 25th

A 9

Amendments are not included in the Doctrine of B.B.C.)" (footnotes added). The by-laws provide further:

> "[t]hat public servants holding the power of force in any country in any age are the most dangerous threat to man's life. These publi[c] servants, who after having taken a solemn, sworn oath to support the constitution, and then, with uninhibited abandon, ride down the natural rights of the Individual, constitute the citizen's deadliest enemy...That at all times it is required that, in the protection of the morals of society as a whole, the membership of this Order shall support a 'Free-enterprise, capitalistic society[']] as opposed

A.10

to all 'Statist Societies' based upon communism, collectivsm, monarchy, fascism or other dictatorship of any kind or nature. It is a sacred principle that complete soverignty (sic) resides in the Individual. Further, that a government of laws is the best and that public servants can only act as deputies in carrying out the soverign [sic] authority of the people...The Sacerdotal functions performed by this Order shall consist of the dispensation and receiving (sic) of natural vitamines, including Laetrille [sic] or vitamin B-17 in such a manner as complies with reason for the purpose of aid, comfort and healing the sick and injured. In each instance

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appropriate ceremony, rites and formalities shall be entered into."

As aggregation of separate Chapters constitutes the church membership. All of these Chapters are under the leadership of Jerome Daly, who has the sole power to form Chapters and to appoint the "Head" of each Chapter.

Appellants organized Chapter 8035 in May 1978. At that time Jerome Daly sent them forms which ordained them as ministers of the Basic Bible Church, chartered their Chapter and appointed Douglas Page as the Head of this Chapter. Under the terms of by the by-laws of Chapter 8035, Douglas, as the Head of the Chapter, holds his position for life and is vested with the sole authority of the Chapter. He named three trustees of

A.12

the Chapter: Carolyn, Wayne Chermack, and himself. The trustees, however, have no right to vote; their sole function is to hold property in trust for the Chapter and to advise Douglas. The latter also has the sole power to control and disburse the funds and property of the Chapter for his own support and for the support of other members of the Basic Bible Church.[5] The record does not disclose exactly how many members appellants' Chapter had, but it appears that there were never more than a very few.

The package of forms Jerome Daly sent to appellants in connection with the organization of their Chapter included advice on how to comply with §501(c)(3) of the Internal Revenue Code. Following this advice, appellants opened

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a checking and savings account in the name of the Basic Bible Church. At all times relevant to this appeal, appellants were the only authorized signatories on these accounts.

Appellants also transferred title to their residence from themselves as husband and wife to themselves "as joint trustees, with the right of survivorship, for the Basic Bible Church of America, Ch. 8035". This residence is a two-story home. Appellants resided on the second floor. They built a workshop, office and chapel on the first floor. The chapel contains two pews, some chairs, a bookshelf and a pool table.

The forms Daly sent to appellants directed them to take a vow of poverty; to obtain gainful employment in their

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respective occupations, as agents of the church; and to turn over to the church the income earned from their work. In 1980, Carolyn obtained a secretarial position with the Employers Overload Company. She earned a total of $1,402.51 that year. Her employer did not withhold any federal income tax because she submitted a letter stating that her position as a minister of the Basic Bible Church exempted her from taxation. Appellants deposited a portion of this income in the church bank account; but, in keeping with the church doctrines directing them to convert any excess money or securities into coins, they converted most of it into silver coins. These coins were kept in the "cash box" maintained by appellants in their home. They did this to avoid an IRS levy on

their bank account to the extent of the value of the coins.

Douglas worked as an engineer. He performed consulting services for four different companies. He earned approximately $40,000.00 in each of the tax years involved; yet he reported for each year no more than $300.00 as tax owed. He submitted notices to his employers or clients advising them that he had taken a vow of poverty and that he would "be on the job as a minister and Agent of [the Basic Bible] Church". These employers and clients, however, drew checks to Douglas individually for his services.

Appellants filed timely tax returns for the relevant tax years. They did not report any tax due on these returns. On March 13, 1984, the Commissioner

issued a statutory notice of tax deficiency to appellants for the 1980 tax year. On May 1, 1984, the Commissioenr issued a statutory notice of tax deficiency to Douglas for the 1979 and 1981 tax years. On October 22, 1984, the Commissioner issued a statutory notice of tax deficiency to Douglas for the 1982 tax year. Appellants challenged the Commisioner's assessment for the 1979,[6] 1980 and 1981 tax years by filing a joint petition with the Tax Court ("the 1980-1981 tax deficiency case"). The Tax Court consolidated these two cases for purposes of trial.

Appellants' position is that they are exempt from any federal income tax because they worked as agents of the churches and not as principals.

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Alternatively, they claim that they are entitled to a charitable deduction for all sums "transferred" to the churches. The Tax Court found that appellants received the income as principals and not as agents of the churches, that they maintained control over the sums transferred to the churches, and that they negligently and intentionally disregarded the rules and regulations of the Internal Revenue Service. Accordingly, the Court concluded that appellants' income is subject to federal income tax and that they are not entitled to any charitable deductions.

The Tax Court's decision determining that there is a deficiency in income tax and additions to tax under §6653(a) due from appellants for the 1980-1981 tax deficiency case on July

A.18

10, 1986. The Court's decision determining that there is a deficiency in income tax and additions to tax under §§6651(a), and 6653(a) and 6654 due from Douglas for the 1982 tax year was entered on the docket in the 1982 tax deficiency case on July 10, 1986.

On July 25, 1986, the Commissioner filed a motion to revise the decision entered in the 1980-1981 tax deficiency case. The Court granted this motion. On August 5, 1986, the Court entered an order vacating its origianl decision and entered a corrected decision in the 1980-1981 tax deficiency case. Appellants took the instant appeal by filing a single notice of appeal on October 14, 1986.

II.

We turn first to the threshold

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questions of whether appellants' single notice of appeal filed October 14, 1986, conferred jurisdiction upon this Court to consider that appeal in the 1982 tax deficiency case as well as in the 1980-1981 tax deficiency case.

A party may obtain review of a Tax Court decision by filing a notice of appeal with the clerk of that court within 90 days of the entry of its decision. 26 U.S.C. §7483 (1982); Fed. R. App. P. 13(a). If no notice of appeal has been filed upon the expiratoin of the time allowed to file such notice, the decision of the Tax Court becomes final. 26 U.S.C. §7481(a)(1)(1982). If, however, a party files a timely motion to vacate or revise the Tax Corut's decision, that motion terminates the running of time

for appeal. Therefore, the full time for appeal commences to run from the entry of an order disposing of the motion or the entry of the decison, whichever is later. Fed. R. App. 13(a).

[1] Here, the Commissioner's motion to revise the Tax Court's decision in the 1980-1981 tax deficiency case terminated the running of the time for appeal from the order entered in that case. The time for appeal in that case did not commence until August 5, 1986, when the Tax Court entered its revised decision. Consequently, appellants' notice of appeal from the Tax Court's decision in the 1980-1981 tax deficiency case effectively conferred jurisdiction upon this Court to consider that appeal.

[2] The Commissioner's motion, however, did not affect the Tax Court's

decision in the 1982 tax deficiency case, which was entered July, 10, 1986. That motion did not terminate the time for appeal from that decision. Appellants' notice of appeal filed October 14, 1986, therefore was not timely as to the 1982 tax deficiency case, having been filed more than 90 days after the decision; and did not confer jurisdiction upon this Court to consider the appeal from that decision. Jefferson Loan Co. v. Commissioner, 249 F. 2d 364 (8th Cir. 1957). Accord, Browder v. Director, Dep't of Corrections, 434 U.S. 257, 271-72, 98 S. Ct. 556, §64-65, 98 S. Ct. 556 (1978).

Appellants argue that the Tax Court's consolidation of the two cases for trial created a single action upon which only one judgment may be entered

A.D

and from which only one appeal may be taken. Appellants misinterpret the law. The term "consolidation" can be used to describe three instances: "First, where several actions are combined into one and lose their separate identity and become a single action in which a single judgment is rendered; second, where all except one of several actions are stayed until one is tried, in which case the judgment in the one is tried, in which case the judgment in the one is conclusive as to the others, third, where several actions are ordered to be tried together but each retains its separate character and requires the entry of a separate judgment." George v. Leonard, 84 F. Supp. 205, 208 (E.D.S.C.) rev'd on other grounds, 178 F. 2d 312 (8th Cir. 1949), cert. denied,

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339 U.S. 965, 70 S. Ct. 1000, 94 L. Ed. 1374 (1950). Clearly, the Tax Court here intended the third type of consolidation, since the opinion specifically states that separate orders are to be entered in the two cases.

The Supreme Court has held that consolidation is utilized as a matter of convenience and economy in administration, but it does not merge suits into a single action or change the rights of the parties. Johnson v. Manhattan Railroad, 289 U.S. 479, 53 S. Ct. 721, 77 L. Ed. 1331 (1933). See also, Cole v. Schenley Indus., 563 F. 2d 35, 38 (2d Cir. 1977); Greenberg v. Giannini, 140 F. 2d 550, 552 (2d Cir. 1944) (L. Hand. J.). While it is true that parties may seek "true consolidation" so that the cases result

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in one judgment and one right to appeal, Minnesota v. United States Steel Corp., 44 F.R.D. 559, 581 (D. Minn. 1968), it is clear that the two cases from which the instant appeal was taken were not the result of a "true consolidation". Rather, the Tax Court entered separate orders and decisions in the two cases, thereby giving rise to separate rights of appeal.

We hold that appellants' notice of appeal conferred jurisdiction upon this Court to consider jurisdiction upon this Court to consider the appeal from the Tax Court's decision in the 1980-1981 tax deficiency case (No. 18580-84) but did not confer jurisdiction to consider the appeal from its decision entered in the 1982 tax deficiency case (No. 822-85). We therefore dismiss the

instant appeal to the extent that it seeks review of the decision determining a deficiency in Douglas' federal income tax for the 1982 tax year and imposing additions to tax for that year under §§6651(a), 6653(a) and 6654 of the Internal Revenue Code.

III.

[3] At the commencement of the trial, appellants moved for a continuance for the purpose of conducting discovery as to whether the IRS discriminatorily enforces its facially neutral rule that one cannot avoid taxation of income by assigning the income to another entity. Finding that issue irrelevant to the case, the Tax Court denied the motion. We agree.

Appellants' claim before the Tax Court and on the instant appeal is that

denominational preference is relevant to this case from a constitutional standpoint. We agree with the Tax Court that appellants' right to practice their religion has not been challenged and that this is not a First Amendment case. Rather, one of the objects of this case was to determine whether appellants had met the requirements of 26 U.S.C. §§170 and 501(c)(3).[8] Appellants' claim is unfounded. See Mone v. Commissioner, 774 F. 2d 570, 573 (2d Cir. 1985).

We hold that the Tax Court correctly denied appellants' motion for continuance on the ground that the issue of whether the IRS discriminatorily enforces its rule is irrelevant to this case.

IV.

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We turn next to the issue of whether appellants received the relevant income as principals or as agents of the churches. Appellants claim that they received the income as agents and not as principals. The Tax Court found that they received the income as principals and not as agents of the church. We agree.

[4-6] A basic principal of tax law is that income is taxable to the one who earns it. United States v. Basye, 410 U.S. 441, 449, 93 S. Ct. 1080, 1085, 35 L. Ed. 2d 412 (1973); Commissioner v. Culbertson, 337 U.S. 733, 739-40, 69 S. Ct. 1210, 1212-13, 93 L. Ed. 1659-1949). It is likewise basic that a taxpayer is not relieved of his obligation to any income tax on any income he earns when he transfers it or assigns it to another

person or entity. Basye, supra, 410 U.S. at 449-51, 93 S. Ct. at 1985-86. If, however, one receives income as an agent for a principal, it is the income of the principal and not that of the agent. Maryland Casualty Co. v. United States, 251 U.S. 342, 345-48, 40 S. Ct. 155, 456-57, 64 L. Ed. 297 (1920). Specifically, if a member of a religious order earns income as an agent of and on behalf of the order, and gives that money to the order pursuant to his vow of poverty, that sum becomes income to the order and the individual is not taxed on it. Conversely, if a member of a religious order earns income in his individual capacity and gives the money to the order pursuant to his vow of poverty, that sum is income to him and is subject to federal income tax. E.g.

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Schuster v. Commissioner, 800 F. 2d 672 (7th Cir. 1986); Fogarty v. United States, 780 F. 2d 1005 (Fed. Cir. 1986).

In determining that appellants received the income as principals and not as agents of the churches, the Tax Court applied the test enunciated by the Second Circuit in Mone v. Commissioner, 774 F. 2d 570 (2d Cir. 1985): "To prove assignment of income on an agency theory, the taxpayers must show that a contractual relationship existed between their secular employees and the regligious order, and that the religious order controlled or restricted the taxpayers' use of the money purportedly turned over to the order." Id. at 573. Accord, Pollard v. Commissioner, 786 F. 2d 1063 (11th Cir. 1986). The Tax Court concluded that, although it was not

A.30

clear whether any of appellants' secular employment actually contracted with the churches, it was clear that the churches did not control or restict appellants' use of the money purportedly turned over the churches.

[7] Appellants do not dispute the fact that the churches did not control or restrict appellants' use of the money. Rather, they advance two arguments. First, they argue that because the directives of their "ecclesiastical superiors" require them to secure secular employment, they earned the income in the exercise of their ministry, within the meaning of the IRS regulations. Second, they argue that the application of the Mone standard for determining agency constitutes a direct violation of both the Establishment

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Clause of the Free Exercise Clause of the First Amendment because such a strict standard is not applied to secular institutions. We find both arguments to be totally without merit.'

In making their first argument, appellants attempt to distinguish their case from other cases where courts have rejected similar cases. E.g. Davis v. Commissioner, 81 T.C. 806 (1983), Aff'd mem. 767 F. 2d 931 (8th Cir. 1985); Stephenson v. Commissioner, 79 T.C. 995 (1982), aff'd 748 F. 2d 331 (6th Cir. 1984); McGahen v. Commissioner, 76 T.C. 468 (1981), aff'd mem. 720 F. 2d 664 (3d Cir. 1983). Appellants' distinctions are frivolous. As the Tax Court observed, even though appellants were meticulous in organizing and operating their churches, giving rise to the

A.30

appearance that their religious doctrines required them to obtain secular employment, and they did not control the money purportedly turned over to the churches, the fact remains that appellants have failed to meet the agency standard and to fulfill the requirements for an exemption under the Internal Revenue Code.

In making their second argument, appellants cite the various revenue rulings which they claim apply less stringent definitions of agency to secular institutions. They argue that this preference in favor of nonreligious organizations violates the First

A.33

Amendment, citing Widmar v. Vincent, 454 U.S. 263, 102 S. Ct. 269, 70 L. Ed. 2d 440 (1981). Appellants misconstrue Widmar. There, the Supreme Court found that the state university's policy of excluding religious groups from holding meetings at university facilities violates the Free Speech Clause of the First Amendment. The Court reiterated the three-prong test for determining whether a policy has avoided offending the Establishments Clause: (1) it must have a secular legislative purpose, (2) its principal or primary effect must be one that neither advances nor inhibits religion, and (3) it must not foster "an excessive government entanglement with religion." Id. at 271, 102 S. Ct. at 276 (citing Lemon v. Kurtzman, 403 U.S. 602, 612-13, 91 S. Ct. 2105, 2111, 29 L.

A.34

Ed. 2d 745 (1971).[9] Clearly, appellants have not established a violation of the Establishment Clause. Nor have they advanced any Free Exercise argument.

We hold that appellants received the income as principals and not as agents of the churches and that therefore such income was not exempt from federal income taxation.

V.

This brings us to the issue of whether appellants were entitled to charitable deductions for the income they purportedly transferred to the churhes. The Tax Court held that they were not entitled to any such decusions. We agree.

[8] In order for appellants to have been entitled to a tax deduction of

A35

the sums they gave to the churches, they would have had to prove that the churches were organized and operated exclusively for religious or charitable purposes and that no part of the sums contributed inured to the benefit of any private shareholder or individual. 26 U.S.S. §170(c)(2)(B) and (C); Welch v. Helvering, 290 U.S. 111, 115, 54 S. Ct. 8, 99, 78 L. Ed. 212 (1933) (Commissioner's determinations are presumed correct; Petitioner has burden of proving him wrong). Appellants contend that the evidence at trial established that they met these standards. The Tax Court, however, found that the evidence clearly estabilshed that appellants did not meet these standards.

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[9] In concluding that appellants were not entitled to any charitable deductions, the Tax Court found:

> "Although [appellants] in this case were more meticulous in their execution of pro forma and other documents and in organizing and operating their 'church,' it is abundantly clear that substantially all of the 'earnings' of the 'church' inured to their benefit and that of their family. [Douglas] caused it, to, in form, appear that he had no control over the 'church' funds or bank accounts, but in realty he retained and exercised control over all money and property involved...All of the authority that [Douglas] contends was outside his control was simply transferred to [his] close personal female friend with whom [he] had become more familiar after his wife departed for California...Nothing essentially changed in the source and nature of the payment of [appellants'] personal living expenses other than the execution of pro forma mail-order church-type documents and changes in the designated name on the bank account from which expenses were paid. Even though the wages and income of [appellants] were moved through an account which was denominated in the name of a church, payments from the account or from cash on hand were almost exclusively

for personal living expenses of [appellants'] family..."

We will not set aside such findings of fact unless clearly erroneous. Cf. Fed. R. Civ. P. 52(a). There is a strong presumption in favor of the trial court's findings of fact. Anderson v. City of Bessemer City, 470 U.S. 564, 573-81, 105 S. Ct. 1504, 1511-1515, 84 L. Ed. 2d 518 (1985). We find that the record is replete with evidence to support these findings as well as the court's conclusion that appellants failed to prove that they satisfied the standards of the IRS for a charitable contribution.

We hold that the Tax Court correctly held that appellants were not entitled to any charitable deductions for any amounts transferred to either of the churches.

VI.

The Tax Court held that Douglas' deficiency in income tax for the 1981 tax year was an underpayment due to the negligence and intentional disregard of the rules and regulations within the meaning of §§6653(a)(1);[10] accordingly, it imposed an addition to tax under §6653(a)(2).[11] The court also ordered an addition to tax under §6653(a) for the 1980 tax year. We agree.

[10,11] Appellants argue that these penalties were not appropriate because they took a position on a controversial issue in good faith and conscientiously sought outside legal advice on all pertinent matters. The Commissioner's asessment of additions to tax, however, are entitled to a

A.39

presumption of correctness and appellants bear the burden of proving that such determinations were improper. Pollard v. Commissioner, 786 F. 2d 1063, 1067 (11th Cir. 1986). Reliance on legal advice does not constitute the required proof. Id.

[12] Moreover, this cannot be considered a controversial issue in light of the number of similar cases where courts have reached the same conclusions reached by the Tax Court here. As the Tax Court observed, "[a]lthough [appellants] have created a more complete or elaborate facade in this instance, we believe that people wish [appellants] education and intelligence must have known that they could not avoid tax or deduct personal

or family expenses in the manner herein accomplished."

We hold that the imposition of additions to tax under §6653(a) was proper.

VII.

[13] The Commissioner urges us to assess sanctions against appellants. The Federal Rules of Appellate Procedure authorize us to award "just damages and single and double costs to the appellee" when an appeal is frivolous. Fed. App. P. 38. We find that such sanctions are appropriate here. "Not only have the courts repeatedly rejected arguments similar to thse offered by appellants, but they have imposed sanctions for frivolous appeal in precisely this sort of case. See e.g. Mone v. Commissioner,

774 F. 2d 570, 575-76 (2d Cir. 1985)]."
Pollard, supra, 786 F. 2d at 1067.

VIII.

To summarize:

We dismiss for lack of jurisdiction the appeal from the Tax Court's decision determining a deficiency in Douglas' federal income tax for the 1982 tax year and imposing additions to tax under §§6651(a), 6653(a) and 6654.

In the 1980-1981 tax deficiency case, we held that the Tax Court properly denied appellants' motion for a continuance on the ground that the issue

of whether the IRS discriminatorily enforces its rules is irrelevant. We also hold that appellants received the relevant income as principals and not as agents of the churches because the churches did not control appellants' use of the funds purportedly turned over to them and that therefore these sums are not exempt from federal income taxation. We further hold that appellants are not entitled to any charitable deductions because because part of the sums given to the churches inured to the benefits of appellants and the members of their family. We further hold that the Tax Court correctly sustained the Commissioner's determination of deficiencies in appellants' income tax for the 1980 and 1981 tax years and that the additions to tax imposed under

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§6653(a) are appropriate. Finally, we direct appellants to pay to appellee double costs and $5,000 attorneys' fees (damages) in this frivolous appeal.

Dismissed in part and affirmed in part, with double costs and $5,000.00 attorneys' fees (damages) assesses agaisnt appellants in this frivolous appeal.

A.42

FOOTNOTES

[1]Unless otherwise stated, all statutory citations in this opinion are to sections of the Internal Revenue Code of 1954 as amended which in turn correspond to sections of Title 26 of the United States Code, 1982 codification.

For example here, Int. Rev. Code of 1954, §6653(a), 26 U.S.C. §6653(a) (1982). We would cite it hereafter as §6653(a).

[2]Appellants were married at all times relevant to this appeal. In 1982, however, appellants separated and Carolyn moved to California. In 1984, appellants were divorced. Carolyn is named as an appellant because she joined the petition to the Tax Court in No. 18580-4, having filed a joint return with her husband for the 1980 tax year. For the 1981 and 1982 tax years they filed individual returns. Deficiency notices for those years were issued only to Douglas.

[3]The Sixteenth Amendment provides that "[t]he Congress shall have power to lay and collect taxes on incomes, from whatever source derived, without apportionment among the several states, and without regard to any census of enumeration."

[4]The Twenty-fifth Amendment provides for the succession of the presidency in the event of the death or resignation of the President.

[5]Having encountered a problem with the Minnesota State Tax Court and having

perceived generally negative attitudes in the community toward the Basic Bible Church, appellants changed the name of their organization to the American Fundamentalist Church and incorporated it as such. They also opened new bank accounts in the new name of the church transferred title to their residence to it.

[6]The Tax Court found that the statute of limitations had run with respect to the Commissioner's claims regarding the 1979 tax year. That part of the Tax Court's decision is not being challenged on the instant appeal.

[7]At the time of this dispute, §170 in relevant part provided:

> "There shall be allowed as a deduction any charitable contribution...payment of which is made within the taxable year. A charitable contribution shall be allowable as a deduction only if verified under regulations prescribed by the Secretary."

[8]At the time of this dispute, §501(c)(3) in relevant part provided:

> "The following organizations are referred to in subsection (a) [exempt from taxation]: Corporations, and any community chest, fund, or foundation, organized and operated exclusively for religious, charitable... purposes,no part of the net earnings of which inures to the benefit of any private shareholder or individual.

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[9]For a scholarly discussion of this test, see Scheidemantle, Political Entanglement as an Independent Test of Constitutionality Under the Establishment Clause, 52 Fordham L. Rev. 1209 (1984).

[10]At the time of this dispute, §6653(a)(1) in relevant part provided:

> "If any part of any underpayment..is due to negligence or intentional disregard of rules or regulations (but without intent to defraud), there shall be added to the tax an amount equal to 5 percent of the underpayment."

[11]At the time of this dispute, §6653(a)(2) in relevant part provided:

> "There shall be added to the tax (in addition to the amount determined under paragraph (1) an amount equal to 50 percent of the interest payable under Section 6601-(A) with respect to the portion of the underpayment described in paragraph (1) which is attributable to the negligence of intentional disregard referred to in paragraph (1)".

UNITED STATES TAX COURT

Douglas A. and Carolyn Page,

Appellants,

AFFIDAVIT OF DOUGLAS A. PAGE

Commissioner of Revenue,

Respondent.

Docket Nos. 1850-84 and 822-25

STATE OF MINNESOTA)
)ss
COUNTY OF HENNEPIN)

Douglas A. Page, being first duly sworn on oath, hereby deposes and says the following:

1. Your affiant is the Petitioner in the above-entitled matter.

2. During the first week of July, 1985, this Court granted the motion of your affiant's former attorney, Robert Spector, to withdraw as attorney for your affiant in the above-entitled matter, despite the fact that the matter had already been set for trial.

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3. Since that time, your affiant has diligently attempted to obtain substitute counsel to represent him in the above-entitled matter. While your affiant cannot recall all of the attorneys your affiant attempted to reach, your affiant did attempt to retain the following attorneys:

a. Saul Bernick: He was not available.

b. Larry Shapiro and Neal Shapiro: One was not available, and the other, after consulting with your affiant, indicated that he knew Mr. Spector, and did not want to take on the case.

c. Marc Kurzman: Your affiant spoke to him and he was not interested.

d. Sanford Knapp: Upon contacting him, your affiant discovered that he was a resident of the State of Wisconsin and only a paralegel, and therefore unable to undertake representing your affiant.

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e. Larry Becraft: He was an attorney from Tennessee, and your affiant was unable to locate him.

f. Larry Roberts: He is an attorney from California who specializes in First Amendment litigation involving churches; he had moved his practice and your affiant was unable to locate him.

g. Eldon Elseth: Your affiant spoke to him, he indicated that he had not practiced in some time and was not interested in representing your affiant.

h. Francis Rondoni: He was busy in August and September, and could not undertake the representation.

i. Roselyn Nordeane: She interviewed your affiant, and declined to assume representation of your affiant.

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j. Thomas Blockman: He was not available.

k. Raymond Rossini: He was not available.

i. Douglas Earrell: He was an attorney in Atlanta, Georgia, recommended to your affiant, your affiant was unable to reach him.

m. It was only until toward the end of August, 1985, when your affiant was able to locate Randall Tigue, who agreed to assume representation in the above-entitled matter.

4. It is only as a result of your affiant's having been left without legal representation in July of 1985, that Mr. Tigue has not had the opportunity fully to prepare to represent your affiant at trial in the above-entitled matter.

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Douglas A. Page

Sworn to and subscribed before
me this 6th day of September, 1985.

Notary Public

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UNITED STATES TAX COURT

Douglas A. and
Carolyn Page,

Petitioners,

vs.

Commissioner of
Internal Revenue,

Respondent.

RENEWED
MOTION FOR
CONTINUANCE

Docket Nos.
18580-84 and
822-85

TO: The above-named Respondent, and Mr. Jack Forsberg, Office of the District Counsel, 572 Federal Building, 316 North Robert Street, St. Paul, MN, 55101, its attorney:

PLEASE TAKE NOTICE that the above-named Petitioners, by the undersigned, will renew their previously filed motion for continuance of the trial in the above-entitled matter, on the ground that there has not been adequate time for new counsel to conduct discovery and to prepare factually on the issue of unequal enforcement by the.

A.33

Internal Revenue Service of its rules concerning assignment of income by religious leaders.

The foregoing motion shall be based upon the attached affidavits and exhibits, and upon all of the files, records, and proceedings herein.

Randall D.B. Tigue
Atotrney for Petitioners
2620 Nicollet Avenue
Minneapolis, Mn 55408
(612) 874-9903

Dated: September 18, 1985.

ASH

UNITED STATES TAX COURT

Douglas A. and
Carolyn Page,

Appellants,

vs.

Commissioner of
Internal Revenue,

Respondent.

AFFIDAVIT OF
RANDALL D.B.
TIGUE

Docket Nos.
1850-84 and
822-85

STATE OF MINNESOTA)
)ss
COUNTY OF HENNEPIN)

Randall D.B. Tigue, being first duly sworn on oath, hereby deposes and says the following:

1. Your affiant is the attorney for Petitioners in the above-entitled matter.

2. Among the allegations set forth in the original Petition filed by Attorney Joseph Mannikko is the allegation contained in paragraph 5F concerning Petitioners' disposition of income, through a vow of poverty, to the

Basic Bible Church of America, and the

American Fundamentalist Church:

> "Taxpayers' returns contain all essential tax information; they have a good faith belief that the sums attributed to them are to the church, in the same manner as fees paid to the Polka Padre for performing, the product of gambling, wagering and agmes of chance such as bingo, 'Cadillac dinners' and "Las Vegas Nights', and the produce of begging; and they have reasonable grounds for differing from the conclusions reached by the Commissioner, in that the Commissioner's position tends to lend aid and succor to larger, established religious organizations and to impose a burden upon new, smaller religions, in violation of the establishment clause and free exercise clauses of the Fourteenth Amendment (sic).
>
> The Commissioner has cspriciously or selectively created and enforced the rules and regulations of the Internal Revenue Service, and willfully structured and put into effect the favoring some religious organizations over others and of denying some religious organizations equal treatment under the law, all in contravention of the establishment clause and free exercise clause of the First Amendment and the Fourteenth Amendment (sic)."

A.56

3. The identical allegation is raised in the second petition for redetermination, filed by Attorney Robert Spector.

4. Your affiant has determined that in the event that the application of rules governing assignment of income are enforced in a manner so as to create a denominational preference, favoring older established religions, such a denominational preference would violate the Establishment and Free Exercise Clauses of the First Amendment to the United States Constitution. See, for example, Larson v. Valente, 102 S. Ct. 1673 (1982).

5. Moreover, it is clear that in the event that the rules concerning assignment of income are generally not applied to other persons, and in the

A.87

event that the decision to pursue the rules against these Petitioners and not others is based upon such impermissible grounds as race, religion, or the exercise of constitutional rights, application of the rules to Petitioner would violate basic due process and equal protection principles. See, for example, Yick Wo v. Hopkins, 118 U.S. 356, 65 S. Ct. 1064 (1886), applied to administration of tax laws by the Internal Revenue Service in Karme v. Commissioner of Internal Revenue, 673 F. 2d 1062 (9th Cir. 1982), and by the United States Tax Court in Church of Scientology of California v. Commissioner, 83 T.C. 381 (1984).

6. During the course of representation of Petitioners, your affiant has become aware that

A.53

substantial evidence exists that major religious denominations function in precisely the same manner as Petitioners are functioning in the instant case, namely performances of clergy of secular functions, in exchange for compensation given to the church. Examples which have come to your affiant's attention include, but are not limited to the following:

a. A Roman Catholic priest doing a television commercial for Kero-Sun portable kerosene heaters, for which a Roman Catholic parochial school was paid the sum of $16,0000.00. See Exhibit A attached hereto.

b. An exotic dancer, who donated approximately 80 percent of her earnings from striptease performances

A.59

to the Roman Catholic Church. See Exhibit B attached hereto.

c. A Roman Catholic nun who engages in secular employment as a handwriting expert to private industry, donating her profits to a religious order, pursuant to a vow of poverty. See Exhibit C attached hereto.

d. An order of Roman Catholic nuns who engage in a business of raising and selling miniature horses, the profits of which are all assigned to their religious order. See Exhibit D attached hereto.

e. A Roman Catholic priest who produces television programs, donating, pursuant to a vow of poverty, all of the proceeds thereof

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to the church. See Exhibit E attached hereto.

f. A Roman Catholic pastor who contracted with a private toothpaste company, to conduct toothpaste research on his parishioners, in exchange for a donation to the church. See Exhibit F attached hereto.

g. The operation by Roman Catholic nuns of high stakes bingo, the proceeds of which are assigned to the church. See Exhibit G attached hereto.

h. The operation by a Roman Cathlic priest of a restaurant and on-sale liquor business, the proceeds of which are donated to the Roman Catholic Church, see Exhibit H attached hereto.

i. Operation of a polka band by a Roman Catholic priest, the proceeds of

A.61

which are assigned to the Roman Catholic Church, see Exhibit I attached hereto.

j. The sale of secular advertising in church bulletins, the proceeds of which are donated to a Roman Catholic Church, see Exhibit J.

k. The operation of an undertaking business by Roman Catholic priests in Denver, Colorado, with proceeds being donated to the Roman Catholic Church, see Exhibit K attached hereto.

l. The operation of a computer business by Russian Orthodox Monks, with the proceeds donated to the church. See Exhibit L. attached hereto.

m. The operation of an oil well by a United Methodist Church, with the

proceeds being donated to the church. See Exhibit M. attached hereto.

n. The operation by Roman Catholic nuns of an automobile repair business, with the proceeds thereof, donated to the church. See Exhibit N attached hereto.

o. The operation by Roman Catholic church officials as a "Mercedes Dinner," wherein gambling is conducted and a Mercedes Benz automobile is raffled off, with the proceeds of the gambling business being donated to the Roman Catholic Church. See Exhibit O attached hereto.

p. The operation by a church group of carpentry and remodeling business, with the profits donated to the church, pursuant to a vow of poverty, wherein the basic living expenses of

A.63

the persons enaged in the business are paid by the church. See Exhibit P attached hereto.

q. The operation by the Christian Brothers of a commercial winery business, the proceeds of which go to the religious order. See Exhibit Q attached hereto.

r. The operation by the Brigittine Order of Monks of a commercial candy business, the profits of which are donated to the religious order. See Exhibit R attached hereto.

s. The operation of a commercial food business by officials of a Ukranian Church in Pennsylvania, with the proceeds thereof donated to the church. See Exhibit S attached hereto.

t. Given the obviously widespread nature of officials of religious orders engaging in secular fund raising activities, assigning the proceeds of their secular labor to the church, it is clear that unless Respondent proceeds against these other religious groups, with the same vigor that it proceeds against Petitioners and other representatives of small, minority, or unpopular religious groups, serious constitutional issues would be raised.

7. From reviewing the files prepared by your affiant's predecessor, it is clear that absolutely no discovery was done with respect to the Internal Revenue Service's practices toward enforcing the "no assignment of income rule" respect to major religious

denominations who engage in the practice. In the absence of such discovery, it is impossible for your affiant adequately to present the issue of denominational preference or unequal treatment, raised in the pleadings.

8. Your affiant executes this affidavit, in response to the Court's suggestion that it would reserve ruling on Petitioners' motion for continuance, if specifics concerning an adequate preparation time were advanced to the Court.

_____
Randall D.B. Tigue

Sworn to and subscribed before
me this 18th day of September, 1985.

_____
Notary Public

(Exhibits eliminated due to page and typing restriction requirements).

A.66

UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

Douglas A. Page
and Carolyn A. Page,

Appellants,

vs.

APPELLANTS' PRO SE PETITION FOR REHEARING EN BANC

Commissioner of
Internal Revneue,

File No. 86-2327

Appellee.

The above-named Appellants, pro se, hereby petition this Court, pursuant to Rules 35 and 40 of the Federal Rules of Civil Appellate Procedure and Rule 16 of the Rules of the United States Court of Appeals for the Eighth Circuit for a rehearing en banc in the above-entitled matter, and in support thereof, tender the following statement, required by Rule 16(d) of the Rules of the United States Court of Appeals for the Eighth Circuit.

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As a pro se Appellant, I express a belief, based upon a reasoned and studied judgment, that the decision in the above-entitled matter, filed July 14, 1987, is contrary to law, and presents questions of exceptional importance, in at least the following respects:

1. The holding of the Court that whether or not the Internal Revenue Service applies its standards concerning assignment of income by ministers of churches, in a manner as to evidence a denominational preference, is irrevelant to Appellants' tax liability raises at least the following issues of serious constitutional concern:

First of all, the panel places Appellants' argument in an erroneous factual context. The panel, in its opinion, states that the object of the case "was to determine whether

A.68

Appellants had met the requirements of 26 U.S.C. §§170 and 501(c)(3) (Opinion at p. 13, footnotes omitted)." In fact, Appellants did not raise the question of denominational preference in that context. Rather, Appellants raised the issue in the context of consideration of the issue of whether or not the Internal Revenue Service rules prohibiting the assignment of income earned by ministers to their churches, was being applied in an evenhanded manner. Appellants asserted the argument that they should be able to conduct discovery and present evidence as to whether or not the Internal Revenue Service rules prohibiting the assignment of income were being enforced only against small, minor denominations, labeled "tax protesters" by the Internal Revenue

A.C.A

Service, and not applied to major religious denominations which engage in the identical practice.

In this context, the relevance of the tendered evidence was obvious. The court cites no authority in support of the proposition that the Internal Revenue Service is free to apply its rules only to certain denominations and not to others. The only case cited by the Court in its opinion is Mone v. Commissioner, 774 F. 2d 570, 573 (2d Cir. 1985), in which the court stated:

> "The taxpayers assert that by disregarding their vows of poverty the Commissioner violated their constitutional right to freely exercise the religion of their choice. Appellants contend that the I.R.S. failed to give the Life Science Church the same recognition accorded 'mainstream' religions. It is patently obvious, however, that the cases before us do not present a question of constitutional magnitude. Rather, the Tax Court confronted the simple issue of

A.70

> whether the taxpayers established the existence of an agency relationship. Members of 'main-stream' religions carry the same duty. The taxpayers' allegations of discrimination are therefore spurious."

However, Appellants, in the instant case, did not assert, as did the taxpayer in Mone, that the mere applicability of the prohibition against assignment of income to a church deprived Appellants of freedom of religion. Rather, they sought discovery to determine whether or not, as far as the practices of the Internal Revenue Service were concerned, "mainstream" religions did in fact carry the same duty as Appellants carry. By way of offer proof, Appellants presented substantial evidence that "mainstream" religions engaged in practices virtually identical to those engaged in by

A.71

Appellant, and sought discovery as to whether or not the Internal Revenue Service, in practice, imposed the "same duty" upon such mainstream denominations. It was this determination that the Tax Court deemed "irrelevant."

Thus, in contrast with Mone, in which the court found that the taxpayer did not make a showing of discriminatory enforcement, Appellants in the instant case sought to engage in the discovery that would enable them to make precisely that factual showing. To say that such a factual showing, if made, is irrevelant is, in effect, to say that the Internal Revenue Service, as a matter of law, is free to apply one set of rules to one denomination, and another set of rules to another. It is to say that the Internal Revenue Service

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may permit the Roman Catholic Church to assign income without clergy incurring personal liability, but not permit the Lutheran Church, or some other church it does not like, to do the same thing. The Court cites no authority for such a proposition, and plainly none exists. The authority in question plainly would prohibit the Internal Revenue Service from applying its rules with a denominational preference. See Church of Scientology v. C.I.R., 83 T.C. 381 (1984) and Karme v. C.I.R., 673 F. 2d 1062 (9th Cir. 1982).

Plainly, on the questions of denominational preference alone, the matter should be reheard and the decision reversed.

2. The appeal also raises a serious constitutional question as to

A73

whether or not application of different standards governing assignment of income, when applied to religious organizations, as opposed to secular organizations, violates the establishment and free exercise clauses of the First and Fourteenth Amendments to the United States Constitution.

As noted in Appellants' original brief, the standards for determining agency, for tax purposes for religious organizations are set forth in Mone v. C.I.R., supra, 774 F.2d 570 (2d Cir. 1985) as follows:

> "To prove assignment of income on agency theory, the taxpayers bear a double burden: They must show that a contractual relationship existed between their secular employers and a religious order, and that the religious order controlled or restricted the taxpayers' use of the money purportedly turned over to the order." Id. at 573.

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Appellants also pointed out that if such a standard were applied to secular organizations, the absence of agency would not have been found in numerous instances in which agency plainly was found. See, for example, Rev. Rul. 58-515, 1958-2 C.B. 28, in which the salaries paid to undercover police officers were found to be earned as agents, rather than principals, attorneys involved in Rev. Rul. 68-282, 1965-2 C.B. 121, and summer youth employees in Rev. Rul. 74-59, 1974-1 C.B. 22.

Appellants pointed out that by applying different standards of agency to religious and secular organizations, the Internal Revenue Service was violating both the establishment clause and the free exercise clause of the

First Amendment, as set forth in Widmar v. Vincent, 454 U.S. 263, 102 S.Ct. 269, 70 L. Ed. 2d 440 (1981), and Everson v. Board of Education, 330 U.S. 1, 67 S. Ct. 504, 91 L. Ed. 711 (1947).

The Court rejected this argument, relying on the 3-part test, that a policy must have a secular legislative purpose, that its principal or primary effect must be one that neither advances nor inhibits religion, and that it must not foster an excessive entanglement with religion.

While setting forth the test, the court does nothing to establish that applying a different agency standard to religious and secular organizations complies with the test. It sets forth no secular purpose for such a distinction, and plainly such a

distinction will have the effect of inhibiting religion, since it makes religious activity more subject to tax liability that secular liability.

These obviously significant issues should be reheard.

3. The court erred in deeming the appeal frivolous and imposing costs and attorneys fees upon Appellants.

It should be noted that imposing attorney's fees and sanctions for a frivolous appeal, this Court did what the Tax Court plainly refused to do. In the Tax Court, Respondent sought damages for bringing a frivolous appeal to Tax Court. The Tax Court judge rejected the argument stating as follows:

> "Respondent, by motion, is seeking damages under §§6673 for instituting or maintaining this case for delay or because Petitioners' position in this proceeding is frivolous or groundless. Based upon the entire

A.77

record in these consolidated cases, we declined to award damages under §6673." Page v. C.I.R., 51 T.C.M., 1331, 1358 (1986).

Respondent took no appeal from this holding.

The Court advances no reasons while arguments plainly found not frivolous by the Tax Court somehow become frivolous when pressed upon appeal. Obviously, the issues of denominational preference, Establishment Clause violations, and other issues raised in this brief are serious, substantial, and taken in good faith. Courts have held that the imposition of sanctions is to be exercised with great caution so as not to "stifle the enthusiasm or chill the creativity that is the very life blood of the law." See Eastway Construction Corp. v. City of New York, 762 F. 2d 243, 254 (2d Cir. 1985).

A72

In the instant case, it is absolutely clear, given the substantial and non-frivolous nature of the arguments advanced by Appellants' attorney, that the sole purpose and the imposition of sanctions was to chill and stifle forceful advocacy by those who oppose the policies of the Internal Revenue Service and big government in general.[1] Unfortunately, the imposition of sanctions have had precisely such effect, since Appellant now does not have counsel willing to sign his name to a petition for rehearing. See attached letter.

For all of the foregoing reasons, Appellants' pro se motion should be granted, and the decision in the above-entitled matter reheard en banc.

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Respectfully submitted

Reverend Douglas Page
Pro Se
1140 North Lilac
Golden Valley, MN 55422

Dated: July 28, 1987.

---

[1]That the Court's imposition of sanctions was motivated by a desire to suppress Appellants' religious and political beliefs is evidenced by the Court's gratuitous insertion into the opinion of Appellants' church's beliefs and philosphy, which should have been irrevelent to the Court's opinion. See pp. 4-5.

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Randall D.B. Tigue
Attorney at Law
Nicollet Avenue South
Minneapolis, MN 55408
(612) 874-9903

July 21, 1987

Reverend Douglas Page
P.O. Box 1414
Minnetonka, mN 55345

RE: Page v. Commissioner of Internal Revenue
Docket No. 86-2327

Dear Reverend Page:

I have previously discussed with you the opinion of the United States Court of Appeals for the Eighth Circuit for the Eighth Curcit in the above-entitled matter. I further indicated to you that a possible remedy at this point would be to petition the Court for rehearing en banc.

As I also indicated to you, Rule 16(d) of the Rule of the United States Court of Appeals for the Eighth Circuit requires, in order for a petition for rehearing en banc to be filed, that the attorney of record certify, based upon a reasoned and studied professional judgment, that the decision is contrary to law or raises issues of exceptional importance.

Because the court panel found the appeal to be frivolous and imposed sanctions upon you, I genuinely fear that I would be subject to such sanctions, were I to make such a certification, even though I

believe such a certification to be merited.

I would therefore advise you to file a petition for rehearing pro se, since I have no desire to be the object of such sanctions by the court.

Yours truly,

Randall D.B. Tigue
Attorney at Law

RT/mk

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UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

No. 86-2327

Douglas A. Page, et al, Appellants,	*	
vs.	*	Appeal from the United States Tax Court
Commissioner of Internal Revenue, Appellee.	*	

Appellants' petition for rehearing en banc has been considered by the Court and is denied.

Petition for rehearing by the panel is also denied.

August 13, 1987

Order entered at the Direction of the Court:

Clerk of U.S. Court of Appeals, Eighth Circuit.

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